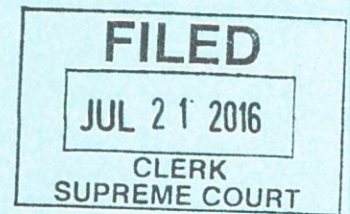


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2015-SC-000435



HUGHES AND COLEMAN, PLLC.

APPELLANT

v.

ANN CLARK CHAMBERS, EXECUTRIX OF
THE ESTATE OF JAMES W. CHAMBERS,
DECEASED

APPELLEE

On review from Court of Appeals
2013-CA-002074-MR

BRIEF ON BEHALF OF APPELLEE ANN CLARK CHAMBERS, EXECUTRIX
OF THE ESTATE OF JAMES W. CHAMBERS, DECEASED

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has this 21st day of July, 2016, been mailed to the following:

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Charles E. Theiler, II

STATEMENT CONCERNING ORAL ARGUMENT

The Appellee agrees with the Appellant that an Oral Argument in this case would provide both parties the opportunity to expand on the information set forth in their briefs, as well as to answer any questions the Court may have.

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COUNTERSTATEMENT OF THE CASE

INTRODUCTION

This discretionary appeal originates from a case that began in Hardin County Circuit Court, Civil Action No. 13-CI-00166, as a dispute over fees awarded in a motor vehicle accident settlement. Hughes and Coleman. Appellants herein, were the first attorneys in the suit who were later discharged. The attorney who took over the case upon Hughes and Coleman's discharge was James Chambers, Appellee herein. Chambers was able to settle the motor vehicle accident claim for \$200,000, upon which Hughes and Coleman placed a lien. Following a hearing, Judge Ken Howard, Hardin Circuit Court, held that Hughes and Coleman were not terminated for cause, and that, as a result, would be entitled to \$49,995.00 of the \$66,666.66 in recovered attorney's fees, representing a *quantum meruit* determination.

Judge Howard's ruling was then appealed by the Appellee herein, James Chambers, to the Kentucky Court of Appeals on the sole issue of termination for cause. The Court of Appeals issued a unanimous opinion reversing the trial court's decision on February 13, 2015. Appellant filed a motion for discretionary review, which was granted by this Court on March 9, 2016.

UNDISPUTED FACTS

Travis Underwood ("Travis") was injured in a motor vehicle accident involving a commercial truck owned by Global Polymers, LLC on October 1, 2012. In that accident, the police report notes that Global was at fault, but also that Travis had been speeding. He sustained multiple injuries in this accident, including a liver injury, intra-abdominal

hemorrhage, and multiple contusions to the chest and abdomen.¹ He eventually incurred more than \$80,000 in medical bills.²

Travis maintained an automobile insurance policy with Progressive Insurance, under which he had \$10,000 in basic reparations benefits (BRB/PIP), as well as \$10,000 in added reparations benefits (ARB). Eight days after the subject accident, on October 9, 2012, Progressive dispersed the first of Travis's PIP payments: \$200 for work loss.³ Following that payment, on October 18, 2012, two bills were paid by Progressive with Travis's PIP: an EMS bill in the amount of \$975.30 and a \$14.76 bill to Hardin Professional Services.⁴

On October 23, 2012, Travis entered into a contract for legal representation with Hughes and Coleman, a law firm with an office in Elizabethtown, Kentucky. The contract provided for representation on a contingency fee basis, and the case was assigned to Hughes and Coleman pre-litigation attorney Judy Brown. The contract stated, in part: "**LEGAL REPRESENTATION**: The Client hereby hires Hughes and Coleman (H&C) to pursue available sources of recovery, as lawyers deem necessary to recover compensation from any persons or entities legally responsible to pay for Client's injuries and damages."⁵ The contract also contained the following provision: "**MEDICAL BILLS**: H&C will *assist* the Client in submitting medical bills for payment to any responsible insurance carrier or agency."⁶

¹ Hughes and Coleman (H&C) Trial Court Exhibit Binder, p. 83.

² *Id.*

³ *Id.* at p. 232.

⁴ *Id.* at p. 231.

⁵ *Id.* at p. 183.

⁶ *Id.* (emphasis added)

On October 25, 2012, two days later, Travis received a letter from Ann Willis, Judy Brown's legal assistant, indicating that she would be assisting in the case. Notably, she wrote that it was her job to "assist in getting the [medical] bills paid."⁷ There was no mention in either the October 23rd contract or the October 25th letter about negotiating medical bills on Travis's behalf; they simply reference assistance with payments. Additionally, neither the contract nor the letter addresses Travis's wage loss claim or the reimbursement of same under the MVRA⁸.

Throughout their representation of Travis, Hughes and Coleman employed a case management system known as Needles. Within this system, attorneys and litigation assistants were able to update the case file with ease, documenting letters sent, phone calls made, and strategies discussed. Within the Needles notes is a letter dated October 25, 2012; Attorney Brown wrote to Progressive, requesting that it "reserve all benefits pursuant to KRS 304.39-241^[9] and pay bills or lost wages only as directed by Hughes and Coleman."¹⁰ Following Brown's letter to Progressive on October 25, she made the following note in the Needles system, directed to her litigation assistant, Ms. Willis: "With bills this high, please get PIP released to us to address out of pocket medicals/copays/prescriptions, lost wages; replacement services and mileage."¹¹

⁷ *Id.* at p. 184.

⁸ The Kentucky Motor Vehicle Reparations Act; KRS 304.39.

⁹ KRS 304.39-214 reads: An insured may direct the payment of benefits among the different elements of loss, if the direction is provided in writing to the reparation obligor. A reparation obligor shall honor the written direction of benefits provided by an insured on a prospective basis. The insured may also explicitly direct the payment of benefits for related medical expenses already paid arising from a covered loss to reimburse: (1) A health benefit plan as defined by KRS 304.17A-005(22); (2) A limited health service benefit plan as defined by KRS 304.17C-010; (3) Medicaid; (4) Medicare; or (5) A Medicare supplement provider.

¹⁰ H&C Trial Court Exhibit Binder, p. 190.

¹¹ *Id.* at p. 35.

On November 6, Ms. Willis wrote Judy Brown, “sent letter to adjuster to release PIP to us to negotiate bills.”¹² Hughes and Coleman’s client was not copied. The letter reads simply: “Please release PIP, made payable to Client (Travis Lynn Underwood) and Hughes and Coleman per attorney Judy S. Brown so we may negotiate bills.”¹³ As justification for release of the entire amount of PIP, Ms. Willis attached a copy of the medical bill from Travis’s stay at the University of Louisville Hospital. That bill was for \$71,812.40.¹⁴ “Thus, while the timeline [Hughes and Coleman] generated reflects that [Hughes and Coleman] intended to use Underwood’s remaining reparation benefits to “address bills, lost wages and other statutorily appropriate uses,” the only reason or evidence [Hughes and Coleman] offered to Progressive for paying out the entire remaining balance of Underwood’s reparation benefits was the U of L bill.”¹⁵

By November 9, 2012, Hughes and Coleman had confirmation that Travis had \$20,000 in PIP/ARB.¹⁶ On November 27, 2012, pursuant to the direction of Judy Brown per the November 6 letter, Progressive sent a check for the remaining PIP benefits – \$18,809.94 – to Hughes and Coleman and Travis Underwood. The check states that it is “in payment of PIP, exhaust, Travis Underwood.”¹⁷ Per the Needles notes, the check was received by Hughes and Coleman on November 30.¹⁸ “Consequently, Progressive made no further payments to Travis and paid no further medical bills on his behalf from the remaining \$18,809.94 in reparation benefits.”¹⁹

¹² *Id.*

¹³ *Id.* at p. 39.

¹⁴ *Id.* at p. 254.

¹⁵ Court of Appeals Opinion, 2013-CA-002074-MR, p. 5.

¹⁶ H&C Trial Court Exhibit Binder, p. 53.

¹⁷ *Id.* at p. 221.

¹⁸ *Id.* at p. 63.

¹⁹ Court of Appeals Opinion, p. 4.

That same day, a document entitled “Power of Attorney” was mailed to Travis. This document, signed and dated by Travis on December 3, 2012, authorized Hughes and Coleman to “endorse [his] name to a settlement draft for the purpose of depositing said funds in Hughes & Coleman escrow account pending final distribution.”²⁰ This document was extremely limited in scope, allowing power of attorney only to “[endorse] the referenced settlement check,” but nothing further. The Needles notes indicate that on December 6, Ms. Willis phoned Travis to check on the status of this document “so that [he] can get his lost wages.”²¹ Later that day, Travis informed Ms. Willis that he sent his lost wage verification to Progressive.²² In a follow up contact, Progressive informed Ms. Willis that they did not have that information.²³

When lost wage verification was not made available, Ann Willis, on December 6, 2012, asked Travis’s mother, Tonia, to send in pay stubs for at least one month before the accident. Travis confirmed that he was off work from October 1, 2012 through November 8, 2012. He was paid PIP of \$200 by Progressive for October 1 through October 5. He made \$8.50 per hour and worked 40 hours per week as a diesel mechanic. Ms. Willis determined that Travis was off work and uncompensated for four (4) complete weeks and three (3) days – a total of 23 days.²⁴

The following day, December 7, 2012, Hughes and Coleman wrote a check in the amount of \$973.00 to Travis in payment of lost wages PIP benefits.²⁵ This was Travis’s first lost wages payment since the initial payment from Progressive two months earlier.²⁶

²⁰ H&C Trial Court Exhibit Binder, p. 220.

²¹ *Id.* at p. 64.

²² *Id.* at p. 65.

²³ *Id.* at p. 66.

²⁴ *Id.* at p. 67.

²⁵ *Id.* at p. 224.

²⁶ *Id.*

Per Ms. Willis, this payment was based on Travis's 23 days of work missed.²⁷ However, per Hughes and Coleman's own notes, he sustained \$1,564.00 in total wage loss.²⁸

Notwithstanding Travis's lost wages from October 1 through October 5, for which Progressive paid \$200 on October 9, once the balance of his PIP was paid over to Hughes and Coleman and placed in their escrow account, Travis was paid but \$973.00 in lost wages benefits.²⁹ This was paid on December 7 for work loss that occurred a month earlier – October 8 through November 8.

The chart below shows from Hughes and Coleman's own notes regarding lost wages what Travis was due in BRB/ARB.

LOST WAGE BENEFITS – H&C					
Period	LW	BRB DUE	PAID	ARB DUE	PAID
10/8/12 – 10/12/12	\$340	\$200	-0-	\$140	-0-
10/15/12 – 10/19/12	\$340	\$200	-0-	\$140	-0-
10/22/12 – 10/26/12	\$340	\$200	-0-	\$140	-0-
10/29/12 – 11/2/12	\$340	\$200	-0-	\$140	-0-
11/5/12 – 11/8/12	<u>\$204</u>	<u>\$200</u>	<u>-0-</u>	<u>\$4</u>	-0-
TOTAL	\$1564	\$1000	\$973	\$564	- 0-

²⁷ *Id.* at p. 67.

²⁸ *Id.* at p. 3.

²⁹ *Id.* at p. 224.

On January 22, 2013, Ms. Brown, in a note to Ms. Willis about PIP reimbursement, wrote that Hughes and Coleman should “release to [Travis] whatever we can justify releasing.”³⁰ No more PIP payments were made. Notably, there is no reference in the Needles notes of any explanation to Travis of what he was due under his PIP/ARB and why he did not receive anything more than \$973.00. After the single wage loss payment from Hughes and Coleman of \$973.00, the escrow balance of Travis’s PIP was \$17,836.94.³¹

In early 2013, the case was passed from Attorney Judy Brown to Brent Travelsted, a litigation attorney at Hughes and Coleman. On January 23, 2013, Mr. Travelsted confirmed with Travis that a civil suit would be filed on his behalf as a result of his accident in October.

On February 11, 2013, the Needles notes reflect that Mr. Travelsted relayed a settlement offer to Travis of \$125,000, to which Travis countered with \$295,000.³² After discussing the case with his client, Mr. Travelsted received a “last best and final” offer in settlement of \$145,000.³³ Attorney Travelsted relayed that he would pass the offer along, but that he would recommend that his client reject the offer; Attorney Travelsted valued the case at closer to \$200,000.³⁴

The following day, Mr. Travelsted notes in the Needles system that he spoke with Travis and his mother for nearly an hour, explaining his evaluation of the claim and the negotiation process.³⁵ However, he wrote, “I’m quite certain that neither understood much

³⁰ *Id.* at p. 92.

³¹ *Id.* at p. 236.

³² *Id.* at p. 132.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at p. 138.

of what I said.”³⁶ As a result of this call, Mr. Travelsted rejected the offer of \$145,000 at the instruction of his client.³⁷

A week later, Mr. Travelsted instructed his litigation assistant, Christina Martin, to “bill [health insurance] and then use the PIP to pay a reduced balance” on Travis’s remaining medical bills.³⁸ To date, as per the Needles notes, Travis’s input was not sought in any of Hughes and Coleman’s decision making, despite their agreement to “assist” him in paying his medical bills.³⁹ On February 18, 2013, and again on February 27, Ms. Martin wrote to Progressive Insurance seeking a letter from Progressive stating that Travis’s PIP benefits had been exhausted.⁴⁰ At the time of the second letter, Ms. Martin sent a check to the University of Louisville Hospital for \$3,492.88 – full payment for Travis’s original \$71,812.40 bill.⁴¹

In response to Ms. Martin’s two requests, Progressive sent their PIP exhaustion letter on March 1, 2013 stating, “[w]e’ve reached the Personal Injury Protection limits available under the policy, so no further benefits are available under the Personal Injury Protection coverage.”⁴² By this time, Hughes and Coleman had of course already received the balance of Travis’s unpaid PIP money in their escrow account, with a remaining balance to date of \$14,344.06.⁴³

On March 8, 2013, using the exhaustion letter from Progressive, Ms. Martin sent letters to all of the healthcare providers who had treated Travis, informing them that PIP

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at p. 142.

³⁹ *Id.* at p. 183.

⁴⁰ *Id.* at p. 391 and 414.

⁴¹ *Id.* at p. 416.

⁴² *Id.* at p. 418.

⁴³ *Id.* at p. 413.

had been exhausted, and that they must submit their payments instead to Travis's health insurance carrier, Anthem BlueCross BlueShield.⁴⁴ Seven of these letters were sent out; Travis was not copied on any of them.

On March 13, 2013, Ms. Martin received an email from Travis's mother, Tonia, requesting his case file and escrow balance and dismissing Hughes and Coleman.⁴⁵ The following day, Ms. Underwood contacted Ms. Martin again, stating the Underwoods' reason for their dismissal: "[o]ne of the reasons that we are letting you go is, the escrow money could have been given to Travis when he needed the money but we were not told that, we were told that you all had to take it and put it into escrow. We have found out that this was not required like we were made to think it was."⁴⁶ In response, Ms. Martin wrote, "[h]ad I known at any time that he was struggling to get by, I would have gladly sent him some (or all) of the PIP money."⁴⁷ On March 18, 2013, Hughes and Coleman unconditionally released Travis's remaining PIP balance to him: \$14,344.06.⁴⁸

After dismissing Hughes and Coleman, Travis proceeded to hire James Chambers to represent him in the lawsuit originally filed by Brent Travelsted and Hughes and Coleman. Mr. Chambers was able to settle the case for \$200,000.⁴⁹ Following the settlement, Hughes and Coleman asserted an attorney's lien against that award for the *quantum meruit* value of their services.⁵⁰

At the trial court level in this case, the Hardin Circuit Court held that Hughes and Coleman's representation was "not deficient, and therefore their discharge was without

⁴⁴ *Id.* at p. 419, 420, 421, 422, 423, 424, and 425.

⁴⁵ *Id.* at p. 152.

⁴⁶ *Id.* at p. 153.

⁴⁷ Court of Appeals Opinion, p. 13.

⁴⁸ H&C Trial Court Exhibit Binder, p. 435

⁴⁹ Court of Appeals Opinion, p. 14.

⁵⁰ *Id.*

cause.”⁵¹ Furthermore, the Court held that Underwood delegated control of his PIP funds to Hughes and Coleman, stating that “the evidence reflects that H&C was not improper in its handling of PIP benefits.”⁵² Finally, the Court apportioned the \$66,666.66 award of attorney’s fees as follows: \$49,995.00 to Hughes and Coleman and \$16,665.00 to James Chambers.⁵³

Chambers appealed, and the Court of Appeals reversed the trial court’s ruling. The Court of Appeals held that “[Hughes and Coleman] was terminated because it maintained a position unsupported by law and adverse to its client. That, in turn, constituted valid cause for Underwood’s termination of the services of [Hughes and Coleman].”⁵⁴ It is from this ruling that Appellant appeals.

ARGUMENT

I. Travis Underwood discharged Hughes and Coleman for good cause sufficient to result in a complete fee forfeiture.

a. The issue

The primary issue in this case is whether Hughes and Coleman was discharged for cause. Based upon the undisputed facts as stated above, it is clear from the record and the notes provided by Hughes and Coleman that Travis Underwood discharged his attorneys for cause, and therefore, they are not entitled to a *quantum meruit* recovery.

In *Baker v. Shapero*, this Court held, “when an attorney employed under a contingency fee contract is discharged without cause before completion of the contract, he or she is entitled to fee recovery on a *quantum meruit* basis only, and not on the terms of

⁵¹ Hardin Circuit Court Findings of Fact, Conclusions of Law and Judgment, p. 5.

⁵² *Id.* at p. 7.

⁵³ *Id.* at p. 9.

⁵⁴ Court of Appeals Opinion, p. 19.

the contract.”⁵⁵ However, if an attorney is discharged for good cause before the completion of the contract, he is not entitled to *quantum meruit* recovery; instead, he must forfeit any fee.⁵⁶ In this case, Travis discharged his attorneys for cause, as evidenced not only by his and his mothers’ affidavits, but also by Hughes and Coleman’s own notes.

b. Hughes and Coleman was terminated for good cause.

In overturning the Trial Court’s decision, the Court of Appeals held, “H&C [Hughes and Coleman] was terminated because it maintained a position unsupported by law and adverse to its client. That, in turn, constituted valid cause for Underwood’s termination of the services of H&C.”⁵⁷

As Appellants note, what constitutes “good cause” is determined on a case by case basis, per this Court.⁵⁸ Still, Appellant’s brief points to the Restatement of Law Governing Lawyers adopted by the Florida Court of Appeals in *Searcy, Denney, Scarola, Barhart & Shipley, P.A. v. Scheller*.⁵⁹ In citing the Restatement, the Florida Court of Appeals enumerates its own standard for determining whether a fee forfeiture is appropriate, considering “the extent of the violation, its willfulness, any threatened or actual harm to the client, and the adequacy of other remedies.”⁶⁰ Additionally, Appellant looks to another state, Maryland, and its approach to handling attorney discharges. However, neither the law of Florida, nor the law of Maryland is binding on this Court; nor has Kentucky adopted the Restatement of Law Governing Lawyers section cited by the Florida court.

⁵⁵ *Baker v. Shapero*, 203 S.W.3d 697, 699 (Ky. 2006).

⁵⁶ *B. Dahlenburg Bonar, P.S.C. v. Waite, Schneider, Bayless & Chelsey Co. L.P.A.*, 373 S.W.3d 419, 423 (Ky. 2012).

⁵⁷ Court of Appeals Opinion, p. 19.

⁵⁸ 373 S.W.3d at 423 (Ky. 2012).

⁵⁹ 692 So. 2d 947 (Fla. App. 1993).

⁶⁰ Appellant’s Brief, p. 26.

Additionally, Appellant cites no Kentucky law on the issue at hand. Kentucky does not follow the law of Florida or of Maryland and has not set out to engage in “the balancing of relevant considerations”⁶¹ when deciding attorney fee forfeiture.

Instead, when looking at Kentucky law, the relevant authority points to the fact that these issues are to be addressed on a case-by-case basis, which is what the Court of Appeals did.⁶² In this case, the facts to take into account are clear. Not only was Hughes and Coleman’s communication with its own client deficient in this case, but also the firm placed itself directly in conflict with that client. Finally, that client was deprived of a statutory right – his right to work loss reimbursement per the MVRA – and he was left with no statutory defenses to combat that deprivation.

c. Hughes and Coleman failed to communicate effectively with their Client.

The Trial Court, in its findings of fact, found that Travis allowed Hughes and Coleman to direct his reparation benefits. However, despite the extensive documentation in the Needles case management system, the fact is that Hughes and Coleman did not fully inform Travis about his PIP benefits at any time during their representation. Per this Court’s rules, a lawyer has a duty to communicate with his client regarding decisions made, so that the client may “effectively participate in the representation.”⁶³ Travis was not given the opportunity to participate in his representation when it came to his PIP benefits.

The Court of Appeals instead found that there was no agreement to allow Hughes and Coleman full control over Travis’s PIP money. Rather, the Court of Appeals held that Hughes and Coleman’s exclusive discretion and control over Travis’s PIP was a “unilateral

⁶¹ *Id.* at p. 27.

⁶² 373 S.W.3d at 423 (Ky. 2012).

⁶³ Supreme Court Rule 3.130 (1.4), Comment 1.

enlargement of authority.”⁶⁴ This “unilateral enlargement of authority” was coupled with a complete lack of effective communication by Hughes and Coleman with its own client about his PIP and lost wages.

To reach this conclusion, the Court of Appeals determined that Travis never agreed to allow Hughes and Coleman to direct his basic reparations benefits.⁶⁵ In the representation agreement/contract signed by Travis and Hughes and Coleman attorney Judy Brown, Travis agreed to allow Hughes and Coleman to “assist [him] in submitting medical bills for payment to any responsible insurance carrier or agency.”⁶⁶ Assistance in paying medical bills was also the explanation Travis was given in correspondence from Ann Willis. Neither the contract nor the letter from Ms. Willis indicated that Hughes and Coleman would be taking over discretion and control of Travis’s PIP monies altogether. Additionally, they did not mention negotiating his medical bills on his behalf; they stated simply that they would assist him in paying his bills.

It is clear from the record that Travis did not understand how his PIP benefits were to be distributed, nor was this fact explained to him. Appellant points to the fact that the Needles system documented a steady stream of communication between the lawyers and legal assistants at Hughes and Coleman and the Underwoods, Travis and his mother, Tonia. However, within this steady stream of communication, the record is devoid of any indication that Hughes and Coleman’s acquisition of Travis’s PIP was ever fully explained to him.

⁶⁴ Court of Appeals Opinion, footnote #5.

⁶⁵ Court of Appeals Opinion, p. 16.

⁶⁶ H&C Trial Court Exhibit Binder, p. 183.

Not only is there no indication that Hughes and Coleman's acquisition of PIP was explained to the Underwoods, but the Needles notes demonstrate that Travis was kept out of Hughes and Coleman's decision making altogether. In Hughes and Coleman's communication with Travis's healthcare providers and with his own insurance company, Travis was kept out of the loop. In Ann Willis's letter to Progressive on November 6, 2012, Travis was not copied. Within the Needles notes, there is no communication to the Underwoods about any breakdown of how PIP was to be paid or why it was or was not paid. Even when Ms. Brown wrote to Ms. Willis that Hughes and Coleman should "release to [Travis] whatever we can justify releasing,"⁶⁷ still there was no follow up with the client. In all of Hughes and Coleman's attempts to get Travis's health insurance to pay his medical bills before paying them with the PIP in escrow, there was no communication with him about this strategy.

This failure of communication set the stage early on for a breakdown of the relationship.

Communication is one of the most important tools a lawyer has, but it must be effective communication; the client must understand, to the best of his ability, his lawyer's strategy. Supreme Court Rule 1.4(b) states that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."⁶⁸ Per the Needles system, it is clear that there *was* ample communication with Travis – but pure volume is not the standard; effectiveness is.

"The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interest, and

⁶⁷ H&C Trial Court Exhibit Binder, p. 92.

⁶⁸ SCR 3.130 (1.4) (b).

the client's overall requirements as to the character of representation."⁶⁹ The *character* of the representation in this case was not clear to Travis. Hughes and Coleman took it upon themselves to claim the full amount of his PIP money and to put it in their own escrow account. In the eyes of the Court of Appeals, as well as in the eyes of the Underwoods, the character of the representation was not fully enumerated, as described by Tonia Underwood: "[o]ne of the reasons that we are letting you go is, the escrow money could have been given to Travis when he needed the money but we were not told that, we were told that you all had to take it and put it into escrow. We have found out that this was not required like we were made to think it was."⁷⁰

In her Affidavit, Ms. Underwood spoke to the lack of effective communication from Hughes and Coleman. Specifically, she stated, "[i]n the beginning (the first 6 weeks) upon hiring Hughes and Coleman in October, they were very prompt about calling us back or answering the phone. But as time went on, they wouldn't return phone calls at all."⁷¹ Additionally, she wrote that they only spoke with Judy Brown one time during her handling of the case, in which they had a 20-30 minute phone call.⁷² She wrote, "[t]hey didn't answer when I called, didn't return phone calls and never responded to voicemails that I left for them."⁷³

"The attorney-client relationship is a special arrangement that requires cooperation and open communication in order to preserve the rights and interchange between those involved. While its primary purpose is to prevent external interference, the relationship can

⁶⁹ *Id.* at Comment 5.

⁷⁰ H&C Trial Court Exhibit Binder, p. 153.

⁷¹ Tonia Underwood Affidavit, p. 1.

⁷² *Id.*

⁷³ *Id.*

be broken down from within. This relationship is based largely on teamwork, cooperation, and communication of each party's goals, expectations, and needs.”⁷⁴ In this case, the relationship was broken down, from the view of the Underwoods, from the repeated lack of communication, as well as from confusion about the PIP funds.

“It appears the only reason Underwood’s benefits were ever placed in his client escrow account, and thus within Hughes and Coleman’s control, is that Hughes and Coleman told him this was required by law.”⁷⁵ This is clear from Tonia Underwood’s March 14 email language: “We have found out that this was not required like we were made to think it was.” Clearly, there was a lack of effective communication on the part of Hughes and Coleman, whether they told the Underwoods their control of PIP was required, or whether they attempted to explain that they were standing in the shoes of Progressive for providing PIP payments, an issue discussed below. Based on the Underwoods’ own Affidavits, as well as the lack of communication on the part of Hughes and Coleman, it is clear that Travis discharged Hughes and Coleman for cause, and that the Court of Appeals Opinion should be affirmed.

II. The holding of the Court of Appeals that Hughes and Coleman was terminated because it maintained a position unsupported by law and adverse to its client is consistent with the Court of Appeals’ Opinion in Medlin v. Progressive Direct Ins. Co.

In the *Medlin v. Progressive Direct Insurance Company*,⁷⁶ Medlin himself completed an application to receive PIP benefits. Included in the application, was a section allowing Medlin to indicate how he wanted Progressive to distribute his PIP benefits. In

⁷⁴ *Lofton v. Fairmont Specialty Ins. Managers, Inc.*, 367 S.W.3d 593, 596 (Ky. 2012).

⁷⁵ Court of Appeals Opinion, p. 17.

⁷⁶ 419 S.W.3d 60 (Ky. Ct. App. 2013).

that section he wrote, “RESERVE BENEFITS” and also checked a box marked “PLEASE PAY ME DIRECTLY (draft will include your name and the name of the medical provider).” Medlin was advised by Progressive that it could only issue a joint check in his name and the name of the medical provider or, if Medlin had already paid medical expenses, a check to reimburse him those medical expenses he paid out-of-pocket. The trial court held that what Medlin wanted Progressive to do amounted to a “preimbursement” and was contrary to the MVRA. In affirming the Lower Court, the Court of Appeals in *Medlin* stated:

In examining the facts of this case, Medlin was offered three ways in which to collect his PIP benefits. He could have Progressive pay his chiropractor directly, reimburse him for money he spent on medical expenses out-of-pocket, or issue him a check in an amount equal to his medical bills and have the check include his name and the name of his medical provider. The first two options are included in the MVRA, and the third option was by agreement by the parties. Medlin declined all three options.⁷⁷

In the case of bar, it was Hughes and Coleman who wrote the letter accompanying the application for benefits requesting that Progressive reserve benefits. It read: “Please reserve all benefits pursuant to KRS 304.39-241, and pay bills or lost wages only, as directed by Hughes & Coleman.”⁷⁸

That letter leaves no question but that Hughes and Coleman intended to direct on behalf of Progressive’s insured, Travis Underwood, which medical bills or lost wages would be paid, though there is nothing in the Needles notes to suggest that he had been consulted on this action.

Within two weeks of the letter reserving benefits pursuant to KRS 304.39-241, Ann Willis sent a letter to Toni Westbay, the PIP claims handler at Progressive, requesting the

⁷⁷ 419 S.W.3d at 83.

⁷⁸ H&C Trial Court Exhibit Binder, p. 190.

release of all PIP monies to Progressive's Insured and Hughes and Coleman's client, Travis, and Hughes and Coleman. Attached as an enclosure to Ms. Willis' letter was a copy of the October 12, 2012 UofL Hospital bill, a bill of twelve pages totaling \$71,812.40. Travis was not copied on this letter. Neither can there be found anywhere in Hughes and Coleman's Needles notes that the requested release had been discussed with Travis or approved by Travis before it was sent. The Court of Appeals observed, "...the only reason or evidence [Hughes and Coleman] offered to Progressive for paying out the entire remaining balance of Underwood's reparation benefits was the U of L bill."⁷⁹

Significantly, there is no proof in the record that Travis, or anyone else for that matter, paid any part of the UofL Hospital bill before Progressive's check for the balance of the benefits was issued. Neither is there any proof that the Judy Brown letter requesting "preimbursement" was even discussed with Progressive's Insured and Hughes and Coleman's client, Travis Underwood, before the letter was written. It is clear that the only reason the check was issued was because Hughes and Coleman suggested that the U of L bill would be paid from these funds – a "preimbursement."

Upon receipt of the PIP proceeds, Hughes and Coleman, using a Power of Attorney it had Travis sign, placed the benefits in its own escrow account "...for the purpose of depositing said funds in Hughes & Coleman's escrow account pending final distribution."⁸⁰ Thus, having obtained a preimbursement contrary to the MVRA, Attorney Judy Brown testified that it then became Hughes and Coleman's duty to administer those benefits pursuant to the MVRA.

⁷⁹ Court of Appeals Opinion, p. 5.

⁸⁰ H&C Trial Court Exhibit Binder, p. 220.

As the Court of Appeals observed, there is no law to support Hughes and Coleman's assumption of the duties of Progressive under the MVRA once the PIP benefits have been paid over to it. Thus, Hughes and Coleman is at once assuming the role of reparation obligor in handling its own client's PIP benefits, leaving the client without the remedies he would have had under the MVRA if Progressive had failed to comply with the requirements of the statute, such as interest on overdue payments. "In other words, [Hughes and Coleman] has clarified that if Underwood ever wanted his reparation benefits, he was required to either prove to [Hughes and Coleman] that he was entitled to them, or terminate the services of [Hughes and Coleman], which is what he ultimately did."⁸¹ In essence, Hughes and Coleman created a conflict between itself and its own client.

The Court of Appeals held that Hughes and Coleman maintained a position that was unsupported by law – forcing its own client, Travis, to either prove his entitlement to his reparation benefits to the satisfaction of his own legal counsel, or fire that legal counsel in order to receive those funds. This holding is not inconsistent with *Medlin*. Had Hughes and Coleman not circumvented the MVRA and obtained a "preimbursement," neither it, nor its client, Travis Underwood, would find themselves in this position, a position which ultimately led to Hughes and Coleman's termination.

III. The agreement between Travis Underwood and Hughes and Coleman did not authorize Hughes and Coleman to place itself in a position of conflict with its own client.

Hughes and Coleman argue that its client was fully aware of the action which Hughes and Coleman was taking on his behalf concerning his no-fault benefits. However, Hughes and Coleman cannot dispute the fact that Travis did not know, when Hughes and

⁸¹ Court of Appeals Opinion, p.12.

Coleman used the UofL Hospital bill to request from Progressive the release of the balance of his PIP benefits, they were seeking a preimbursement contrary to the MVRA. By accepting Travis's PIP and asserting discretion over it, Hughes and Coleman subjected itself to the same requirements the MVRA imposed on Progressive, i.e. to require Travis to provide proof of entitlement to benefits before they could be paid out. The Court of Appeals found that there was no legal authority to support Hughes and Coleman's position on this point. Travis did not know, nor could he had been held to know, that his own attorneys put themselves into a position of conflict with him when they agreed to represent him in his claim for PIP benefits, only to later require him to prove his entitlement to his own attorneys.

The Court of Appeals in *Daugherty v. Runner* set out the level of service a client can expect from members of the legal profession, as follows:

Since the relationship of attorney-client is one fiduciary in nature, the attorney has the duty to exercise in all his relationships with this client-principal, the most scrupulous honor, good faith, and fidelity to his client's interests.⁸²

The Court of Appeals held that by requiring Travis to prove entitlement to benefits to his own counsel before these benefits would be paid out, Hughes and Coleman created a conflict between itself and its client. This conflict was found by the Court of Appeals to be good cause for termination.

IV. The Court of Appeals did not engage in improper fact-finding in its Opinion.

Hughes and Coleman argues that the Court of Appeals, in reversing the Trial Court, made separate findings-of-fact to support its erroneous reading of the law. Yet, it cites but

⁸² 581 S.W. 2d. 12, 16 (Ky. Ct. App. 1979).

one example of such separate finding-of-fact to support its argument. Hughes and Coleman claims that the Court of Appeals improperly accepted the Affidavits of Travis and his mother as fact, when those Affidavits were contested. Hughes and Coleman conveniently overlooks, however, the fact that the Court of Appeals pointed out, even if it accepted as true the allegations in the Affidavits of Travis and his mother, there was other evidence to support the fact that Hughes and Coleman subjected the escrowed funds from Travis's PIP benefits to its own discretion after they were deposited into Travis's client escrow account.

The evidence, other than the Affidavits of the Underwoods, relied upon by the Court of Appeals was set forth as follows:

Irrespective of the manner in which [Hughes and Coleman] represented the reparation benefit funds would be spent, however, [Hughes and Coleman] subjected the funds to its discretion after they were deposited into Underwood's client escrow account. According to its timeline, for example, [Hughes and Coleman] dispersed some of the funds to Underwood on December 6, 2012 in what it deemed a "PIP-based lost wage reimbursement." Before doing so, Hughes and Coleman required Travis to prove to his own counsel the full amount of work that he had missed due to the October 1, 2012 accident. Based upon Travis's proof, Hughes and Coleman unilaterally determined Travis was entitled to \$973.00. As an aside, this was the first and last occasion Hughes and Coleman would make any payment to Travis from his reparation benefits during its tenure as counsel.⁸³

It is clear that the Court of Appeals based its decision on more than simply the Affidavits of the Underwoods. Thus, Hughes and Coleman's one and only example of an alleged improper fact-finding by the Court of Appeals simply does not support its contention that the Court of Appeals engaged in improper fact-finding in its Opinion.

⁸³ Court of Appeals Opinion, p. 9.

CONCLUSION

Based on the foregoing, the Appellee, Ann Clark Chambers, Executrix of the Estate of James W. Chambers, respectfully requests that this Court uphold the Opinion of the Court of Appeals. It is clear from the facts that Hughes and Coleman was deficient in its representation of its client, Travis Underwood, to the point of being terminated. Because of their lack of effective communication, coupled with the fact that they placed themselves in direct conflict with their own client by asserting discretion and control over PIP in conflict with the *Medlin*, Travis was left with no other option but termination. For the reasons stated above, Hughes and Coleman were fired for cause. They are due no attorney's fees from the settlement of Travis Underwood's personal injury claim.

Respectfully submitted,



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